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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

In re W.W, a Person Coming Under the  
Juvenile Court Law.

ALAMEDA COUNTY SOCIAL  
SERVICES AGENCY,

Plaintiff and Respondent,

v.

N.W.,

Defendant and Appellant.

A125409

(Alameda County  
Super. Ct. No. OJ06004176)

**I. INTRODUCTION**

This is the second appeal involving W.W. In the first appeal, plaintiff and respondent, Alameda County Social Services Agency (the Agency), and W.W. argued that the trial court erred in concluding defendant and appellant, N.W. (Mother), had established that the parent-child welfare exception to the termination of parental rights set out in Welfare and Institutions Code section 366.26<sup>1</sup> applied. In our opinion in that matter, we held that, although there was evidence in support of a contrary decision, there was, nevertheless, substantial evidence to support the trial court's order, which we affirmed.

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code, unless otherwise noted.

In this appeal, we consider whether, in a subsequent hearing held pursuant to section 366.3, the juvenile court erred in concluding that Mother failed to meet her burden under section 366.26, subdivision (c)(1), to establish the “parent-child welfare exception” to the termination of parental rights. Finding substantial evidence supporting the court’s order, we affirm it.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

W.W. lived with Mother from his birth in 2004, until his second birthday, when he was removed from Mother’s home, which was dirty and unsafe. Mother submitted on the initial petition and the juvenile court assumed jurisdiction. On August 24, 2006, after a contested dispositional hearing, the court found W.W. a dependent, removed him from Mother’s care and placed him with a foster family.

Mother participated in services, and regularly visited W.W., but failed to make sufficient progress in her case plan. On February 15, 2007, when W.W. was three years old, the court terminated services to Mother and set the matter for a section 366.26 hearing.

The Agency filed status reports for the section 366.26 hearing on May 29, July 9, and September 4, 2007. An addendum report was also filed on October 5, 2007. In these reports, the Agency recommended that Mother’s parental rights, as well as those of the presumed and alleged fathers, who join with Mother in this appeal, be terminated.

At the section 366.26 hearing, which began on October 5, 2007, a number of witnesses testified on Mother’s behalf. Reverend Vern Morley testified that he had known Mother for nine and a half years. Mother was a participant in his church. He had seen her and W.W. together “numerous times.” From the time W.W. was born, Mother came to Morley’s house “at least four or five days a week.” “[W]e would have dinner together. She would take me occasionally to doctor’s appointments . . .” Mother always brought W.W. with her when she came to Morley’s house. W.W. was born premature, and Mother had previously miscarried twins and then another child. While the child was in the hospital, for two months, Mother stayed with him “almost 24-7.” Morley testified that Mother “was an extremely caring and attentive mother to the point

where she was watching him constantly. There was a few incidents where he wasn't getting proper oxygen and stuff. If she wasn't there he might not have been with us." Morley also made weekly visits to Mother's home.

During this time, according to Morley, "[t]he home was in order." He observed that Mother "gave [W.W.] a lot of attention, more than what I have seen most parents deal with for giving a child attention. She was there constantly with him." He described W.W. as "always happy. . . . He tended to be quite happy." He was affectionate toward his mother. "He was always hanging on her and kissing her." He was nourished, dressed appropriately, had his own bedroom, furnished appropriately for a child his own age. Morley did not see Mother engage in any inappropriate behavior toward her son. Prior to being placed in foster care, W.W. did not engage in any pinching or biting.

Morley saw Mother "pat [W.W.] on the butt, but it wasn't really hard. It was just—it wasn't a hit. It was a pat." He wasn't aware of Mother having any mental health issues. He knew that "she was taking some medication to help her cope" with the loss of W.W. In the last 17 months, during which time W.W. had been in foster care, he had not seen Mother interact with W.W. on their visits.

Eloy Martinez testified. He had been a neighbor of Mother for about 30 years and had met W.W. "dozens of time" during visits at home, at the park, and at birthday parties. He last saw Mother and W.W. together in June 2006, when W.W. was two years old. Mother took very good care of her son. She was always with him, and they seemed close and affectionate with each other. He had never seen her behave inappropriately with W.W. She seemed like the typical normal parent. Mother had two dogs, a bird and a goat who "was outside doing the yard work." He did not see feces on the floor of Mother's house and Mother cleaned out the bird cages regularly. He would be surprised to learn that Mother kept a messy house. He had never seen Mother physically discipline W.W.

Shawniese Tilmon, W.W.'s therapist, testified. Tilmon, who has a Ph.D. in clinical psychology, worked at Children's Hospital, and had worked with W.W. and Mother in therapy for one year. In a letter she wrote on October 1, 2007, she stated that

she had observed Mother and W.W. for a total of 46 sessions. At the time of her testimony, she had seen them for 54 sessions. During this period of time, Mother maintained regular visitation and contact with W.W. When asked if she had observed, during these sessions, “anything that would cause you to conclude that W.W. would benefit from continuing the relationship with his mother,” Tilmon responded “I do.” In her letter describing the relationship between Mother and W.W., Tilmon specifically mentioned that “there are occasions where [W.W.] seems happy to see his mother, runs to her when she calls him and is able to reciprocate his mother’s affection.” She had observed W.W. in a very recent visit “melting into his mother’s arms” and holding hands, as well as “exchang[ing] glances, smiles and some laughter.” She described a visit when W.W. experienced “much joy” in sitting on Mother’s lap and singing with her. Not all visits between W.W. and Mother had gone as well as these visits, but she agreed that “with the passage of time and the administration of . . . therapy . . . the interaction between the mother and child has improved.”

Tilmon also described visits in which Mother had difficulty dealing with W.W.’s “extremely aggressive” behavior. Tilmon had some concern about Mother’s ability to pick up on W.W.’s “cues” during some visits. She was also concerned that when Mother became agitated, W.W. would pick up on that and himself become aggressive and agitated. At one point in their therapy, she had recommended reducing some visits because the length of the visits seemed to be too long for the environment in which they were held, namely, at W.W.’s preschool.

When W.W.’s foster parents picked him up at the end of visits with Mother, Tilmon sometimes observed W.W. running to them. She was not yet prepared to recommend unsupervised visits for the Mother. Recently, however, she had observed “an increased number of sessions” in which Mother and W.W. “have done incredibly well.”

Minou Djavaherian, a marriage and family therapy intern, had been seeing Mother on a regular basis since August 2006, for “nearly 72 sessions.” When she came to Djavaherian, Mother had been diagnosed with bipolar disorder. In her therapy sessions with Djavaherian, Mother worked on her parenting skills, including skills related to

W.W.'s difficult behavior. In Djavaherian's opinion, Mother is attached to her son and "interested in seeing that he had a successful life." She also testified that Mother was very cooperative and consistent in her attendance at therapy.

Keisha Washington, a friend of Mother's, testified that she had known Mother for over 20 years and also knew W.W., whom she babysat for a few months when Mother was working in Modesto. Mother dressed W.W. appropriately, did not leave him at Keisha's house for extended periods of time, asked how W.W. was at the end of the day, appeared affectionate and was a "very concerned mother." She saw a lot of "cooing and smiling" from W.W. during this time period, which occurred when W.W. was about a year old.

Janet Bayer, who was employed the Alameda County Social Services Children and Family Services, testified that she was assigned to W.W.'s case for a year, from September 2006 to the time of the hearing. She never observed W.W. and his Mother in their home environment. She agreed that Mother had maintained regular visitation and contact with W.W. "with very few exceptions." She was "not sure" if W.W. would benefit from continuing his relationship with his mother. She testified that "[t]here are times when there seems to be very positive moments between [W.W.] and his mother, and there are other times that I have been concerned about detriment and I've had those conversations with Dr. Tilmon as well." She had observed occasions where the behavior she saw "would be beneficial to continue for the child." She had never observed Mother physically or sexually abuse W.W., although she had observed her "to be harsh with him or to withhold affection from him at times."

Bayer testified that W.W. is developmentally delayed. Mother participated in treatment or services for W.W. before the petition was commenced. "[S]he welcomed those services and was participating in them." Mother was a single parent during this time. According to Bayer, Mother "not only was cooperative but sought them [services]. I think there were instances where she might have had some conflicts with some of the involved professionals and that might have impacted her pursuing those services."

During the time Bayer knew her, Mother “has dealt with some mental health issues for which she is taking medication specifically dealing with bipolar disorder II . . . some depression. She herself has physically not appeared to be in good health. She’s described a number of health issues, and I believe that I did see some documentation of fibromyalgia.”

Bayer recommended termination of parental rights because she was “very concerned about the impact of that relationship on [W.W.] and the long-term impact of him being without a parent who can help him emotionally and developmentally.” She was concerned about Mother’s “ability to be consistent over time in responding to him in an appropriate way in terms of being emotionally available and attentive to him, setting appropriate limits with him without using physical punishment and providing him with a sense of emotional security.” Her “wish is that continued contact could be enjoyable with no detriment to him. My worry is that it could be confusing to him and cause continued anxiety for him.” She was aware that in March 2007, Mother “had been very upset and depressed about the situation with her son and had talked about wanting to kill herself or her child.” She did not see this statement “as a threat. . . . It was thoughts and feelings.” She conveyed her concern about this statement to Mother’s therapist. The therapist was surprised and said she would follow up.

Bayer had not monitored a visit between W.W. and his mother since July 2007. She had observed positive interactions between W.W. and his Mother. In fact “most of the visits that I observed had moments that were very positive.” Mother had reported to her that, when W.W. did something she did not approve of she would “pop” his hand. She never herself observed Mother do this. However, she was aware that another therapist had observed Mother do this on one occasion.

In December 2006, W.W.’s foster parents told her that Mother had made a threat against Bayer. Mother had never done anything aggressive toward her. In the 12 months before the hearing, Mother had not done anything she perceived as a threat to her.

Jenny Janow testified that she had known Mother “for years.” Mother patronized her business. She saw Mother and W.W. every week until W.W. was placed in foster

care. W.W. always was appropriately clothed and well nourished. Mother exhibited “care and concern for him” when she saw them together. She was affectionate with him and W.W. responded to her affection. Mother hugged and kissed him and he responded. He appeared to be a happy child with no health issues. Mother regularly took W.W. to doctor’s appointments. The last time she saw W.W. and Mother together was around W.W.’s first birthday.

Catresa Parquet testified that she had known Mother her “whole life.” After W.W. was born, she saw Mother every two weeks or so. She went to some doctor’s appointments with Mother. W.W. was always clean, well-fed and mother was affectionate with W.W. Mother would tell W.W. she loved him and he would appear “like he loved her.” She had seen Mother and W.W. together three to four times in the last year. She never saw Mother hit W.W. She attended a visit with W.W. and Mother when he was old enough to talk. He told her “I love you mommy.”

Mother testified. She was currently suffering from “fibromyalgia, degenerative disk of the third lumbar, arthritis, lymphoma, leukemia, asthmatic, thyroid, heart murmur, migraines, chronic pain.” She had been treated for cancer and for some heart and lung problems. Other than one occasion when she was in the hospital, she had not missed any visits with her son. Although it could be a burden for her to come to some of the visits due to her health, she came anyway because she loved her son. She went to the visits to make sure her son was clothed, and healthy and well fed.

W.W. was born prematurely at 31 weeks. He required significant medical assistance and was in intensive care for two months. Mother stayed 22 hours a day with him. She took him every day after he was discharged to a doctor “to keep up with his weight.” Every day, “I drove from Modesto all the way back to downtown Oakland.” On his first birthday, W.W. had four birthday parties. Her “family was so happy that he survived that everybody gave him a party. . . . We were ecstatic that he was getting better. He was at his right weight. That he lived.”

Mother had W.W. placed at the Regional Center because “he was diagnosed with retardation of growth. . . . Every program that was offered to me, I took it because I

wanted my son to be – to get the best care he could get.” When W.W. was a little over 18 months, Mother arranged for him to enroll in a preschool. She took him to school. She took him there after her chemotherapy appointments. She dressed him, or had help from her cousins or a nurse. She purchased clothing for him, did the laundry, made him dinner and got him ready for bed. She read to him twice a day. She described W.W. as “happy. He was always smiling. He was always laughing. His mommy can make him laugh. He was the happiest little baby I’ve ever seen. Not just because he’s my baby. But he was always happy.”

When he was diagnosed with asthma, she gave him a breathing treatment. No doctor had ever advised her that she was not properly providing care for him.

According to Mother, after W.W. was placed in foster care he became violent. “He would bite. He would hit. He really didn’t want to be held by anybody.” She had not seen this behavior before he was placed in foster care. Typically, when she picked him up from school he was happy to see her and ran to her smiling. After he was placed in foster care, “[s]ometimes he was happy to see me, sometimes he’s not. But lately, he’s been happy to see me the last couple of months.”

In Mother’s opinion, W.W. would benefit from continuing their relationship. She explained, “I’m all he knows. I’m his only living relative. We have a bond . . . I’m the only one that understands him. I carried him for nine months. I took care of him for two.”

Mother acknowledged telling a child welfare worker that it was okay to “pop” her son on his hands if he hit her. She also said the same thing to the staff at the preschool. Mother acknowledged that there might have been charges pending against her for child endangerment, although she believed that those charges had been dropped. She did not believe her bipolar disorder affected W.W. She acknowledged that she had animals in her home and W.W. had been diagnosed with asthma. She also acknowledged that she took medication for her mental health issues.

At the conclusion of the hearing, on February 7, 2008, the juvenile court found that Mother had met her burden under section 366.26, subdivision (c)(1), and declined to



terminate Mother's parental rights. We affirmed this decision in an opinion filed on March 17, 2009.

On April 17, 2008, in anticipation of a post-permanent plan review under section 366.3, the Agency filed a report. In this report, it request that "the Social Services Agency be granted discretion to reduce the frequency of mother-child visits, based on clinician recommendations and worker assessment of the best interests of the child." Attached to the report were thorough assessments of WW.'s status by mental health worker, Shawniese Tilmon, Ph.D., and Liz Walser, MSW.

The Agency reported that, in a letter dated March 26, 2008, Tilmon "indicates that for the majority of the past seventeen months, [W.W.] has responded to maternal visits with disorganized behavior including tantrums, aggression, hitting, kicking, spitting and throwing objects. The exception was a four-month period from October 2007 to February 2008, when [W.W.]'s behavior during visits became more manageable, and the mother was able to respond more appropriately when he did have difficulty. Since February 2008, there has been a marked deterioration in the child's behavior during visits and in the mother's responses that is quite concerning. [W.W] has been quite verbal in protesting visits ('No see Mama [N.]!'), and has repeatedly lashed out physically at Dr. Tilmon, relying on the clinician to contain his frustration and help him calm down. He has responded to maternal visits with disorganized behaviors, such as tantrums (previously described), head banging or putting down his head and avoiding eye contact. On her part, the mother has responded either in a 'firm, harsh manner that further escalates W.W.'s behavior rather than providing comfort,' or else by ignoring the child until he re-engages with her. The mother typically arrives on time for visits and often brings gifts for the child. Instead of making progress in her ability to empathize with the child's experience and consider his needs, [Mother] has reverted back during recent visits to disinterested or negativistic attitudes and behaviors. [Dr. Tilmon] describes the mother's reluctance to assume parental responsibility. For example: 'She has repeatedly made the statement that the system has created this "monster" of a child so let them fix or deal with him.' Dr. Tilmon comments: '[W.W.]'s mother seems unable and unwilling to

provide the ongoing and regular help he needs which raises grave concern about how they would function outside of a supervised setting.’ ”

Dr. Tilmon recommended that the frequency of visits between W.W. and Mother be reduced to no more than once a month “to avoid the distress and discomfort” experienced by both W.W. and Mother.

The report also summarized and attached a letter from social worker Elizabeth Walser, dated March 24, 2008. Walser “has provided home-based therapy to the child and caregivers since October 2006.” Walser “raises her own concerns regarding the impact of frequent maternal visits on [W.W.] Ms. Walser describes the child's trauma history and recurrent tantrums and states: ‘The foster parents believe that these behaviors are worse on certain days, such as days when [W.W.] has been visiting with the birth parent. I cannot say definitively what the impact of visitation is on this child because I have not seen him with his mother. However, I can definitively say that on days when the usual Monday visit has not occurred, the child is much calmer, much more organized, and much more responsive to the love and limits that are provided in the home. Based on these observations, I believe it would be better for this child if visits were reduced.’ ”

Walser also “question[ed] the appropriateness of [the] permanent plan in light of [W.W.]’s emotional vulnerabilities.” The report noted that “It is not clear . . . that the current plan of Long Term Foster Care is adequate to meet this child’s needs for permanency. As the Court is aware, the Social Services Agency recommended that the child be legally freed for adoption.” The report acknowledged that an appeal of that decision was pending. The Agency requested that, at the post-permanency planning hearing, “the [Agency] be granted discretion to reduce the frequency of mother-child visits, based on clinician recommendations and worker assessment of the best interests of the child.”

At a hearing on April 22, 2008, the court admitted the Agency’s report into evidence and ordered that “[t]he Child Welfare Worker is given discretion to reduce the frequency of the visits between the child and the mother.” The court also set a six-month dependency status review for October 6, 2008. The court advised Mother, who was

present with counsel, of her appeal rights. However, no appeal of the court's order permitting the reduction of Mother's visits with W.W. was filed.

On September 30, 2008, the Agency filed a Status Review Report regarding the six-month dependency status review hearing set for October 6, 2008. The Agency recommended that the court continue dependency. The Agency also recommended that the court set another section 366.26 hearing, "with the recommended plan being termination of parental rights and adoption." The Agency observed that "[a]lthough the mother clearly loves [W.W.], she demonstrates psychological and other challenges that render her unable to parent him now or in the foreseeable future. The circumstances of removal were so serious that two years later, the mother is facing a criminal trial on charges of felony child endangerment. Due to safety concerns and because the mother-child interaction periodically deteriorates, ongoing Social Services Agency involvement and therapeutic supervision has been necessary to support visitation. During the current reporting period, a reduction in the frequency of maternal visits had a beneficial impact on the child." The Agency also reported that it had recently learned that a year earlier "the criminal court ordered that [Mother] have no contact with W.W." The Agency requested that the juvenile court "clarify the current orders regarding visitation."

The Agency observed that "[i]t is not evident . . . that the current plan of Long Term Foster Care is adequate to meet [W.W.]'s needs for permanency. Nor is it readily apparent that monthly visits with his mother are beneficial (let alone essential to this child's well being), especially when weighed against his pressing need for stability and security in his primary caregiving relationships. The most permanent plan possible should be pursued for this child, so that we are in a position to reassure him that the caregivers that he has come to rely on for the past two years will continue to be there for him no matter what. It is this experience of being claimed fully by his preferred 'Mommy' and 'Pappy' that will enable W.W. to heal emotionally from past neglect and trauma and reach his developmental potential."

On October 20, 2008, the court held the six-month review post-permanency planning hearing. At the hearing, the County asserted that, with regard to its request for a

section 366.26 hearing, new evidence merited the setting of that hearing. It stated that, notwithstanding the pendency of an appeal on the first section 366.26 hearing before this court, it was “governed by section 366.3(g), which requires the Court in the case of children who are placed in long-term foster care to not only review the appropriateness of the permanent plan at every review but to set a new .26 hearing unless the Court can find by clear and convincing evidence that there is—that such a hearing would not be in the best interest of the child because the child is being returned to a parent or that the child is not a proper subject for adoption or that no one is willing to accept legal guardianship.”

Mother’s counsel argued that a section 366.26 hearing should not be held while the first appeal was pending. He also argued that the hearing was not necessary because there were no new grounds to justify it.

The court continued the hearing to permit the parties to “address whether there are new grounds for re-visiting the .26.”

In a report filed on November 21, 2008, in preparation for the continued hearing, the Agency observed that “it does not appear that W.W. is benefiting in any clear or consistent way from continued contact with his birth mother. Per child welfare worker observation” as well as the observations of his foster parent and reports by the clinician who sees W.W. on a regular basis “[W.W.] rarely mentions his mother nor does he ask to see her.” “After the previous 366.26 Hearing resolved in February 2008, maternal visitation deteriorated to such a striking degree that both the ECMH clinician (who facilitated visits until recently) [Tilson] and the SEED therapist [Walser] voiced concerns about detriment to the child. . . . Since May 2008, maternal visits have been scheduled on a monthly (rather than weekly) basis.” W.W. “benefited from a reduction in the frequency of maternal visits.”

The Agency also reported that at the end of a monthly visit on October 6, 2008 “[W.W.] wanted to take a toy home (that his foster father had reportedly given him). Instead, the mother took the toy (saying she would keep it for the next visit). [W.W.] responded by crying and spitting and otherwise showing extreme distress. Dr. Tilson[] helped to calm the child down . . . .” Mother did not attend the scheduled November 6,

2008 visit. The social worker understood that, “during her last [visit] with the child, the mother was questioning whether it was worthwhile to continue seeing him given the Social Services Agency recommendation to legally free this child for adoption.”

The hearing on the necessity of setting a section 366.26 hearing was held on December 12, 2008. The court found “no clear and convincing evidence . . . that it is not in the best interest of the minor to hold a .26 hearing . . .” and accordingly set the matter for a hearing under section 366.26. This order was not appealed.

In a report filed April 6, 2009, in anticipation of the April 13, 2009, section 366.26 hearing, the Agency reported that W.W. is “an adoptable child who has made exceptional progress since he was placed in foster care in June 2006. He has loving and stable caregivers who have been interested in adopting him for years. . . . [¶] Since April 2008, when visits with his mother were decreased to one time per month, [W.W.] has demonstrated more stable behavior after the visits. . . . To the mother’s credit, she makes much more effort to make visits pleasant; she plays with [W.W.] and is open to suggestions from the social worker. However, [W.W.] is sensitive to his mother’s mood and if the mother were to decompensate, [W.W.] would be at risk of decompensating too. Under the current permanent plan, the caregivers do not have discretion to suspend visits if they become detrimental to [W.W.]”

The Agency acknowledged that the juvenile court had earlier found a beneficial parent-child relationship. It explained that “the child sees the mother far less than before . . . and he has not demonstrated any distress about the reduction in contact. According to [W.W.’s] therapist, Elizabeth Walser, [W.W.] rarely mentions his mother and when he does, it is generally negative. . . . According to the caregiver, [W.W.] believes the caregivers are his parents and he has asked them who [Mother] is. Prior to the last visit he asked, ‘What does she do?’ ”

The Agency concluded that W.W.’s “stability is undermined by the Permanent Planned Living Arrangement which is not the most permanent plan. The Social Services Agency continues to seek permanence for [W.W.] by recommending termination of parental rights and adoption.”

On April 13, 2009, the section 366.26 hearing was continued to May 14, 2009. On May 12, 2009, the Agency filed an Addendum Report. This report included a case update from Liz Walser, a social worker at the Children's Hospital of Oakland's Center for the Vulnerable Child SEED program, who had been working with W.W. Since her last report on November 18, 2008, Walser had continued to work with "[W.W.] on a weekly basis in the home of the foster parents." The foster parents were, according to Walser, committed to W.W. and had a "strong healthy attachment" to him. W.W., in turn, "appears to be well attached to [them]."

In her case update, Walser reported that "[t]he foster parents continue to take [W.W.] to the visits with his mother once a month. They no longer report major concerns about those visits that the mother attends, although they notice that the mother has an emphasis on material things which keep the child focused on the things rather than on the relationship. The child never raises the issue of his mother in our weekly therapy, although he will respond to my questions about her. He recently asked this therapist why his foster mother and I refer to [his mother] as 'Mommy [N.] and his foster mother patiently explained that this was his birth mother. He does not seem to understand this, but he was not distressed by it either. He simply does not understand his connection to her despite the fact that the foster parents speak respectfully about her."

Walser went on to say that the lack of permanency in W.W.'s life due to the then-current long term foster care plan was "a major concern." Freeing W.W. up to be adopted "by the current caregivers. . . . would be beneficial to the child's mental health . . . ."

At the hearing on May 14, 2009, Cindy Schwenger, a social worker with the Agency, testified that W.W. had been her client for four or five months. During that time, Mother skipped two visits, one in November and one in December 2008. Mother did not explain her absence at the time. In January 2009, after Mother resumed her visits, Mother explained that she had had a miscarriage.

During the first visit Schwenger supervised, W.W. told her he wanted to go home and did not want to see Mother. However, Mother also told W.W. she loved him, and

W.W. told her he loved her. Schwenger explained that Mother asked her to take a photograph of Mother in which W.W. was sitting on her lap and smiling. W.W. smiled in the photograph because Schwenger asked him to.

After Schwenger's testimony, the hearing was continued to June 26, 2009.

In an addendum report filed on June 24, 2009, the Agency described a visit between Mother and W.W. in which Mother organized a birthday celebration for W.W. The social worker characterized the interaction between the two as "limited." According to the social worker "[d]uring the 60 minute visit, [W.W.] did not initiate play with his mother nor did he ask her to play with him and his new toys. [W.W.] did not request help from mother even when he attempted to open the packages which are quite difficult to open . . . . [W.W] did not initiate affection. He seemed quite content and was more-or-less in his own world playing with his new toys."

Liz Walser, the SEED social worker, testified on June 26, 2009. Walser did not supervise visits between W.W. and Mother. Rather, she met with W.W. weekly, and had done so since November 2006. She provided "child-parent psychotherapy with [W.W] and his foster parent." She did not provide services to Mother, because she was assigned to provide services to W.W.

She observed W.W. after he returned from visits with Mother. During his first year, when he was having weekly visits with Mother, W.W. "exhibited a reaction that was more consistent with a trauma reaction, someone who is disturbed by a visit with their parent. He did not exhibit a grief reaction" at being separated from Mother. Walser testified that "[o]n several occasions after the visit [with Mother] he would say, 'No [Mother], No [Mother.]' "

Walser denied having any bias or prejudice. She liked the foster parents very much, wanted to see them adopt the child, and did not know the Mother. Walser did not believe W.W. benefited from visits with Mother. She observed that he "does not ask for his mom; he does not wonder about his mom; he does not show any benefit from these visits." Rather, she described the symptoms shown by W.W. (tantrums, sleep

disturbance, poor regulation, aggression) as not anxiety over separation from Mother, but the cause of “Reactive Detachment Disorder and Post-Traumatic Stress.”

She also stated that W.W. “has made a great deal of improvement since the beginning of treatment. His sleep disturbance is gone. His regulation has improved. His eating is more regulated. He now uses language to ask for the things he wants. He can look into his caregiver’s eyes. He can ask for comfort when he is upset. He can ask for help when he needs help. He has decreased his aggressive behavior.” She stated that “[h]e is no longer kicking, hitting, spitting, scratching, crawling around on the floor, hiding under tables when he is upset. He can say ‘I am upset’ when he is upset. He still does have difficulty, but they are not nearly as extreme as they were in the first year.”

She explained, “I believe that his foster parent has been very attentive, very participatory in treatment, very much following the recommendations that we’ve given; and they’ve developed a healthy and safe, trusting relationship. He now has a caregiver who is safe and predictable and consistent who meets his needs, and he is no longer coming from a place of fear. He is coming from a place of safety and security.”

According to Walser, before a visit with Mother, W.W. “has nightmares and dreams of monsters, and he has said to his foster mom that he has these nightmares. She has never connected with him that it is related to the visits; but she did begin a strategy of not telling him that he was having a visit until the day of the visit because she felt that it created a sleep disturbance.”

Walser strongly recommended a permanent plan of adoption by the foster parents. She explained that W.W. “has the ability to form healthy attachments which he has demonstrated in his current relationship. However, if you continue to leave him in foster care and don’t provide him the opportunity to have a safe and permanent family, as he gets older and he begins to ask questions about permanency, it could trigger him into further symptoms because he continues to have a status of someone who doesn’t have a permanent family.”



The hearing was again continued and, on June 26 and July 7, 2009, Mother testified about her relationship with W.W. She was with W.W. after his premature birth during the two months he was in the hospital. She was there 20 hours a day, every day.

Mother has health problems, including diabetes. She testified that on October 13, 2008, she had a son who lived two days and died. She did not have a miscarriage, as she earlier reported. Rather, Mother was hospitalized for 15 days, and had an emergency caesarian. The Agency disputes this testimony, pointing out that Mother appeared in court on October 6, 2008, and again on October 20, 2008, and, therefore, could not have been hospitalized for those fifteen days before October 13, 2008.

Mother denied burning W.W.'s back, but admitted that she pleaded guilty to one misdemeanor count of a violation of Penal Code section 273, subdivision (a) (child abuse) for facts that gave rise to W.W.'s dependency.

On July 7, 2009, the juvenile court found that Mother had failed to show a beneficial parent-child relationship and ordered Mother's parental rights terminated.

This timely appeal followed.

### **III. DISCUSSION**

#### **A. *Standard of Review***

At the conclusion of a section 366.26 hearing, a court may decline to terminate parental rights if it "finds a compelling reason for determining that termination would be detrimental to the child . . . ." (§ 366.26, subd. (c)(1)(B).) One such compelling reason occurs when the court finds that "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) The parent has the burden of proving that this exception—often referred to as the parent-child relationship exception—applies. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.)

Here, the court found that the parent-child relationship exception did not apply, a conclusion challenged by Mother. Preliminarily, we note that the parties disagree about the applicable standard of review. The Agency contends that the abuse of discretion standard of review applies and Mother argues that the substantial evidence standard of

review is the correct standard. We review the juvenile court's decision regarding the applicability of this exception under the substantial evidence standard of review. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) We are, of course, aware that the court in *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351, applied the abuse of discretion standard of review to this question. However, it also noted that the practical differences between the abuse of discretion and substantial evidence standards of review "are not significant." (*Id.* at p. 1351.) Here, were we to apply the abuse of discretion standard to this case, we would reach the same result.

**B. Substantial Evidence**

The juvenile court found, based on the evidence before it, that "there is no parental relationship that benefits W.W. at this time." Substantial evidence supports this finding.

In *In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108-1109, the court explained that, to establish the exception in section 366.26, subdivision (c)(1)(A), the parents must do more than demonstrate " 'frequent and loving contact' " (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418), an emotional bond with the child, or that the parents and child find their visits pleasant. (*In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.) Rather, the parents must show that they occupy "a parental role" in the child's life. (*In re Beatrice M.*, *supra*, 29 Cal.App.4th at p. 1419.) To do so, a parent must establish that their relationship with the child "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

Substantial evidence supports the juvenile court's conclusion that Mother did not meet her burden of showing that the termination of her relationship with W.W. would deprive him of "a substantial, positive emotional attachment." (*In re Autumn H.*, *supra*,

27 Cal.App.4th at p. 575.) At most, Mother has established that she loves W.W. and, when he was hospitalized after his birth, she was dedicated to his welfare. This sort of emotional bond with the child is insufficient to establish the parent-child relationship exception. Rather, Mother was required to show that she occupied a “parental role” in W.W.’s life, and this she was unable to do.

The record is replete with evidence that W.W. sees his foster parents, rather than Mother, as his parents. He rarely mentions his mother and does not ask to see her. At times, he is openly resistant to seeing her.

Instead of promoting W.W.’s well being, Mother’s interactions with W.W. did the opposite. The relationship between W.W. and Mother appears to disturb her son. For her part, Mother’s role in these visits is not parental. The Agency reported that, after the first section 366.26 hearing, when the court did not terminate Mother’s parental rights, there was a “marked deterioration in the child’s behavior during visits and in the mother’s responses that is quite concerning. [W.W.] has been quite verbal in protesting visits (‘No see Mama [N.]!’), and has repeatedly lashed out physically at Dr. Tilmon, relying on the clinician to contain his frustration and help him calm down. He has responded to maternal visits with disorganized behaviors, such as tantrums (previously described), head banging or putting down his head and avoiding eye contact. On her part, the mother has responded either in a ‘firm, harsh manner that further escalates [W.W.’s] behavior rather than providing comfort,’ or else by ignoring the child until he re-engages with her. The mother typically arrives on time for visits and often brings gifts for the child. Instead of making progress in her ability to empathize with the child’s experience and consider his needs, [Mother] has reverted back during recent visits to disinterested or negativistic attitudes and behaviors. [Dr. Tilmon] describes the mother’s reluctance to assume parental responsibility. For example: ‘She has repeatedly made the statement that the system has created this “monster” of a child so let them fix or deal with him.’ Dr. Tilmon comments: ‘[W.W.]’s mother seems unable or unwilling to provide the ongoing and regular help he needs which raises grave concern about how they would function outside of a supervised setting.’ ”

After the court reduced Mother's visits to once a month, W.W.'s behavior began to improve. W.W. showed no distress when the visits were reduced, another sign that Mother does not occupy a parental role in his life.

In sum, it appears that although the court initially found that Mother had established a beneficial parent-child relationship, whatever improvements Mother had made in her relationship with W.W. were not permanent and she can no longer make this showing. Without question, W.W.'s well-being is not promoted by this relationship and certainly does not outweigh his well-being in the home of permanent adoptive parents. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576.)

Mother points out that there is also evidence that she visited W.W., played with him, and brought him gifts and that W.W. referred to her as "Mama [N.]" This evidence, however, does not negate the substantial evidence that supports the court's conclusion. "The general rule with respect to appellate review is that, though appellants' evidence may be overwhelming, it should be disregarded . . . . The test is not whether there is substantial conflict, but whether there is evidence in favor of the respondent. If there is substantial evidence in favor of respondent, *no matter how slight it may appear* in response with the contradictory evidence, the judgment will be affirmed. The appellate court should only look at the evidence supporting the successful party and disregard the contrary showing. This principle is . . . that the general approach of the appellate courts is to construe the evidence in the court below so as to support the decision in the lower court. In its scrutiny of the record, it will eliminate from its consideration evidence contrary to or in conflict therewith. In applying the substantial evidence test it is the evidence favorable to the respondent . . . that will be considered and conflicting testimony supporting appellants, however persuasive it may be, is generally of no consequence." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873.)

Nor do we agree with Mother that social worker Walser was somehow inappropriately biased in favor of the adoptive parents. Walser obviously had an opinion as to what permanent plan was in W.W.'s best interest, but this opinion is certainly not an

indication of any sort of inappropriate bias, and the trial court's reliance on it shows that it found her to be a persuasive and credible witness.

Finally, Mother argues that she was "prejudiced" by the court's order permitting the Agency to reduce her visits with W.W. and suggests that the court erred in setting a second section 366.26 hearing. Mother did not appeal either the order permitting the reduction in visits or the order setting the second section 366.26 hearing. Any issue regarding them has, therefore, been waived.

#### **IV. DISPOSITION**

The order appealed from is affirmed.

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Haerle, J.

We concur:

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Kline, P.J.

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Richman, J.